

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

FAO No. 5242 of 2006

Date of decision : 4.12.2006

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Parties Name

Makhan Singh

..... Appellant

vs.

Kashmir Chand and others

..... Respondents

Coram: Hon'ble Mr. Justice S.N. Aggarwal

Present: Sh. A.K. Chopra, Senior Advocate with
Sh. Harminder Singh, Advocate for the appellant.

Sh. Vikas Behal, Advocate for respondent No.1.

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S.N. Aggarwal, J.

This appeal is filed against the order dated 31.10.2006 passed by the Election Tribunal, Nawanshahr by which recounting of votes has been ordered.

The facts of the case are that elections for the office of Sarpanch of Gram Panchayat Mallupota took place on 29.6.2003. Makhan Singh-appellant and Kashmir Chand-respondent contested the elections. After counting, the appellant was declared elected as he had secured two votes more than the votes secured by Kashmir Chand-respondent. 34 votes were declared invalid.

Kashmir Chand-respondent filed the election petition. Number of allegations were made. It was contested by Makhan Singh-appellant. The application for recounting of votes filed by respondent No.1 was however, dismissed by the learned Election Tribunal vide order dated 22.11.2004. Again on 28.1.2005, respondent No.1 filed another application for recounting of votes. The same was accepted by the learned Election Tribunal vide order dated 8.2.2005. This order was challenged by the appellant by filing CR No. 1158 of 2005. This petition was accepted by this Court vide order dated 9.5.2006 and the order of recounting dated 8.2.2005 was set aside. The Election Tribunal was directed to decide the election petition in accordance with law. Thereafter, the learned Election Tribunal recorded the evidence and vide impugned order dated 31.10.2006 received by the appellant vide letter dated 21.11.2006, the recounting of the votes has been directed by the learned Election Tribunal.

Hence, the present appeal.

The submission of the learned counsel for the appellant was that the Election Tribunal was bent upon to order the recounting of votes even after the first application for recounting filed by respondent No.1 was dismissed on 22.11.2004. The same order was passed by the Tribunal on 8.2.2005, which was set aside by this Court vide order dated 9.5.2006 passed in CR No. 1158 of 2005. Again the appellant apprehended the passing of the order of recounting of votes by the Election Tribunal and filed CR No. 5332 of 2006. But the said petition was dismissed by this Court vide

order dated 13.10.2006 with the direction to the Election Tribunal that whenever the order of recounting is passed, the same shall not be given effect to for a period of 15 days from the date when the certified copy of the order is supplied to the appellant. Hence, it was submitted that this conduct of the Election Tribunal clearly revealed that the Election Tribunal was bent upon directing recounting of votes.

This submission has been considered. It has no merits at all. The dismissal of the application for recounting of votes at the first instance on 22.11.2004 did not operate as *resjudicata* against the Election Tribunal to pass appropriate orders as the new situation which arises. Therefore, no motives can be attributed to the Election Tribunal for this reason. When the order dated 8.2.2005 was passed by the Election Tribunal for recounting of votes, it was so done without recording any finding. The same was set aside by this Court vide order dated 9.5.2006. Even the passing of this order cannot be taken to be estoppel for ordering recounting if the situation so demanded after considering the evidence and the Election Tribunal was at liberty to pass the order of recounting as the Election Tribunal was directed to decide the election petition in accordance with law vide order dated 9.5.2006 passed by this Court. Therefore, the previous history about the passing of the order for recounting of votes is immaterial for examining the validity and legality of the impugned order dated 31.10.2006. This order has to be examined independently on its own merits.

A perusal of the order reveals that respondent No.5 had

leveled numerous allegations against the election process in which the appellant was declared elected. One of those allegations was that 34 votes were cancelled illegally by the Returning Officer and therefore, recount of votes was prayed. Respondent No.1 had even made a statement before the Election Tribunal that he gave up all other allegations except the one that 34 votes were cancelled illegally and the votes should be recounted.

Attention of this Court was drawn by the learned counsel for the respondent even to the written reply filed by Makhan Singh-appellant before the Election Tribunal. In the said written reply also Makhan Singh had pleaded in paragraph 4 (ii) (on merits) of the written reply that respondent No.3 (Presiding Officer/Polling Officer) has helped the petitioner (Kashmir Chand) by cancelling valid votes of respondent No.1 (Makhan Singh). It means, therefore, that even Makhan Singh had pleaded in the written reply that some valid votes polled in favour of the appellant were counted as invalid votes by the Returning Officer/Polling Officer/Presiding Officer.

The Election Tribunal has also observed in the impugned order dated 31.10.2006 that the other allegations were not pressed by the petitioner i.e. respondent No.1 herein. Since, the margin of votes between the appellant and respondent No.1 was only two and the allegation was that 34 votes were cancelled illegally, therefore, recount of votes would serve the ends of justice. It was also stated in the impugned order that video recording of counting of votes would also be prepared and maintained. Recounting, therefore, obviously has been directed by the Election Tribunal after proper appreciation

of pleadings, evidence and the submissions made before him.

Learned counsel for the appellant placed reliance on the judgment of the Hon'ble Supreme Court reported as **Chandrika Prasad Yadav vs. State of Bihar and others** AIR 2004 SC 2036 and submitted that the order of recounting if not supported by cogent and valid reasons, is liable to be set aside. It was further laid down in this judgment that narrow margin of votes by itself is not sufficient for the issuance of direction of recounting.

There is no dispute with the legal preposition laid down by the Hon'ble Supreme Court, but in the impugned order dated 31.10.2006 it has been observed by the Election Tribunal that respondent No.1 has given up all other issues except the issue that valid votes have been cancelled illegally. Even the appellant has pleaded in the written reply that the valid votes of the appellant have been counted as invalid votes. Even, the Tribunal has reached the conclusion that in view of the allegations of cancelling the valid votes illegally and particularly when the margin of votes between the elected candidate and the defeated candidate was only two, the recounting of votes shall serve the ends of justice.

The secrecy of ballot paper of course is to be respected but it cannot be at the cost of fair elections. The Hon'ble Supreme Court has held in the judgment reported as **S. Raghubir Singh Gill vs. S. Gurcharan Singh Tohra and others** AIR 1980 Supreme Court 1362 as under :-

“ The interpretation of S. 94 which appeals to us ensures free and fair elections. Secrecy of ballot was

mooted to ensure free and fair elections. If the very secrecy of ballot instead of ensuring free and fair elections strikes at the root of the principle of free and fair elections this basis postulate of democracy would be utilised for undoing free and fair elections which provide life-blood to Parliamentary democracy. If secrecy of ballot instead of ensuring free and fair elections is used, as is done in this case, to defeat the very public purpose for which it is enacted, a suppress a wrong coming to light and to protect a fraud on the election process or even to defend a crime, viz., forgery of ballot papers, this principle of secrecy of ballot will have to yield to the larger principle of free and fair elections.”

Even recently, the Hon’ble Supreme Court has been pleased to repeat the same view of law in the judgment reported as **Nayini Narasimha Reddy vs. Dr. K. Laxman and others** 2006 AIR SCW 2564 observe as under:-

“The second question is whether, the evidence of the witness would breach the secrecy of the election process. It has been held by this Court in *S. Raghubir Singh Gill v. S. Gurcharan Singh Tohra and others* [(1980) Supp SCC 53] and *A. Neelalohithadasan Nadar v. George Mascrene and others* [(1994) Supp (2) SCC 619] that the purity of the election process is more important than the privilege conferred by

Section 94 of the Act. This Court has recognized that the secrecy of voting could be breached to subserve a larger public good, namely, to prevent a fraud on the election process. My learned brother has dealt with this aspect and I am in agreement with him.”

Therefore, the order of recounting of votes is not to be set aside, particularly when the order has been passed by the Election Tribunal with reasons.

However, the impugned order dated 31.10.2006 passed by the Election Tribunal suffers from an irregularity. The irregularity is that in the opening paragraph of the impugned order dated 31.10.2006 it is recited that this order shall dispose of the election petition, while actually, it is not so. The order dated 31.10.2006 is only an interim order. It does not dispose of the main election petition, which shall be disposable only when the final result is announced. The order of recount dated 31.10.2006 is not the final order in the election petition. Therefore, the opening line of this order is liable to be modified to make the election petition still pending.

The impugned order dated 31.10.2006 cannot be sustained when it orders recounting of votes as a whole. The only issue before the learned Election Tribunal was whether 34 votes have been cancelled illegally, for which the Election Tribunal passed the order of recounting. Therefore, since the allegation was limited only to illegal cancellation of 34 votes, therefore, recounting of votes was also to be confined only to 34 cancelled votes and not

to all the votes polled in the election process held on 29.6.2003. The learned Election Tribunal is required to examine only 34 votes cancelled by the Returning Officer at the time of original counting in order to find out whether these votes were cancelled illegally or rightly.

In view of the discussion held above, the impugned order passed by the learned Election Tribunal is modified only to the extent that the impugned order is not a final order, it is only an interim order. Secondly, the recounting of votes shall take place only of 34 cancelled votes, in order to examine whether the votes have been cancelled wrongly or rightly. Since, respondent No.1 has given up all other allegations, therefore, the remaining votes are not to be recounted by the Election Tribunal.

Keeping in view the discussion held above, this appeal is partly accepted.

(S.N.Aggarwal)
Judge

December 4 , 2006.
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